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that he regarded himself as their superior. Full of affairs of his own, he never seemed to forget what concerned them. Constant as was the demand upon his time and thoughts, his faculties were always at the service of those who needed help or advice from him. Devoted as he was to his family and they to him, they did not so absorb his affections but that he was always full of sympathy for those of his friends who suffered, and among the first to rejoice with them in prosperity.

In writing this it may be laid to my charge that, as he said of himself, "my pen may be guided by the impulse of strong affection," but, if so, who of those who knew him is not subject to the same disqualification?

R. T. BARTON.

Winchester, Va.

JURISDICTION OF COUNTY OR CORPORATION COURT ON TRIAL FOR FELONY TO SENTENCE FOR MISDEMEANOR.

In the March number (1897) of the VIRGINIA LAW REGISTER, C. A. G., whom I take to be the distinguished Professor of Common and Statute Law of Washington & Lee University and one of the Associate Editors of the REGISTER, invites the views of the readers of that journal as to whether the Act, approved March 5, 1896, (Acts 1895-6, p. 924, ch. 845) takes away the jurisdiction of the County and Corporation Courts to give judgment for a misdemeanor on a verdict of conviction where under our statute law the accused, charged with a felony, may be acquitted by the jury of the felony and convicted of a misdemeanor. In commenting on this Act in note to *Lacey v. Palmer*, 2 Va. Law Reg. 95, Judge Burks propounds the *quære*: How are these statutes affected by the Act referred to of March 5, 1896? The language of the Act is "The several Police Justices and Justices of the Peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall have exclusive original jurisdiction of all misdemeanor cases occurring within their jurisdiction, in all of which cases the punishment may be the same as the County and Corporation Courts are authorized to impose," etc.

This question, of course, cannot arise under the many statutes to be found in the Code, and in the amendments thereof, making the punishment for certain offences confinement in the penitentiary, or in the dis-

cretion of the jury confinement in jail and a fine, for in these cases the offence is a felony ; a felony being such an offence as *may* be (not *must* be) punished by death or confinement in the penitentiary. *Benton's Case*, 89 Va. 570. In such cases the County and Corporation Courts sentence for a felony though the punishment assessed by the jury be confinement in jail and fine.

The question arises, however, in all cases where under our statutes a party is charged with a felony and on the trial the jury acquits of the felony, and convicts of a misdemeanor. Has the court jurisdiction, since the Act of March 5th, to render judgment on the verdict as for a misdemeanor? Professor Graves quotes Clark's Cr. Procedure, p. 6, as laying down the law on this point, as follows: "If a court has jurisdiction of the offence charged, its jurisdiction is not ousted by proof of a less offence, of which it could not have taken jurisdiction. On indictment for grand larceny, for instance, the defendant may be convicted of petit larceny, though the court would have had no jurisdiction of a charge of petit larceny." I have not been able to consult Clark's Criminal Procedure, the book not being in our Law Library, but have examined the cases cited, except that of the *People v. Rose*, 15 N. Y. Supp., and they bear out the text.

In *Ex Parte Bell*, Supreme Court of California, decided Oct. 18, 1893, 34 Pac. p. 641, the court said: "The petitioner was accused by information of the crime of grand larceny, and after a trial in the Superior Court, convicted of petit larceny. His imprisonment in the county jail upon that conviction is alleged to be unlawful, because the Superior Court has no jurisdiction of petit larceny. But the charge of grand larceny gave the Superior Court jurisdiction, and the statute authorizes a conviction of petit larceny when grand larceny is charged. Penal Code of Cal. 1159. Writ denied." We have a similar statute allowing in a prosecution for grand larceny the accused to be found guilty of and sentenced for petit larceny. Code of Va., sec. 4043. Clarke, J. speaking for Supreme Court of North Carolina, declares "It has been repeatedly held that when the indictment in the Superior Court charges an assault with a deadly weapon, the court retains jurisdiction, although in the proof simple assault only shall be shown. *The State v. Will Fesperman*, 108 N. C.

To the same effect is the opinion of the court in the case of the *People v. Fahey*, 64 Cal. p. 342. The case of *A. J. Winburn v. The State of Florida*, 28 Fla. 839, decided June, 1891, is the strongest and most apposite of the cases cited by Mr. Clark in his Criminal Pro-

cedure. The plaintiff in error was indicted, and tried in the Circuit Court for an assault with intent to murder, and convicted of an assault and battery: Held, that the offence charged in the indictment determines the jurisdiction, and when the Circuit Court has acquired jurisdiction by reason of said charge, it has under the Constitution and statute jurisdiction of all lesser offences included in the indictment, and can pass sentence for the assault and battery, which is included in said indictment. Said Mabry, J.: "It is contended by counsel for plaintiff in error that the court had no jurisdiction to proceed further in the case when the jury returned a verdict of guilty against defendant for assault and battery. The original jurisdiction of Circuit Courts extends to all criminal cases not cognizable by inferior courts. Article V., sec. 22, Const. 1885, Fla. Justices of the peace shall have jurisdiction in such criminal cases except felonies as may be prescribed by law. Article V., sec. 22, Const. 1885, Fla. By statute they are empowered to hear and determine cases of assault or assault and battery not charged to have been committed riotously or upon any officer, or with intent to commit any other offence. It is further provided, however, "that where any person is tried in any Circuit Court of this State for an offence of which such Circuit Court has original jurisdiction, and such person is found to be guilty of any lesser offence included in the offence for which indictment or information is filed against him and for which he is being tried and is not found guilty of the greater offence, he may be convicted in said court and sentenced for such lesser offence, though it be an offence of such a nature as would come originally within the jurisdiction of an inferior court. Chapter 3271 Laws of Florida. The indictment preferred against plaintiff in error is for an assault with intent to murder, an offence exclusively within the jurisdiction of the Circuit Court. The charge in the indictment determines the jurisdiction. *McLean v. State*, 23 Fla. 281. The Circuit Court having acquired jurisdiction of the offence charged in the indictment against the defendant, has under the law jurisdiction of all lesser offences included within the said offence." Our own Code, sec. 4040, provides: "If a person indicted of felony be by the jury acquitted of part and convicted of a part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor," which gives the right to the County and Corporation Courts to sentence as for a misdemeanor on a verdict of conviction, where the accused is tried under an indictment charging him with a felony. The court acquiring

jurisdiction because of the indictment for a felony, sentences as for a misdemeanor, on a conviction for misdemeanor under the section of the Code just above quoted. This statute, as well as the one already alluded to, allowing a conviction and sentence for petit larceny in a prosecution for grand larceny, is still the law of the State, and is not repealed by the Act of March 5, 1896. To one who is at all familiar with the passage of this Act and the reasons which impelled the legislature to enact it, there can be no doubt that it was not intended to repeal sections 4040 and 4043 of the Code, and for the courts to hold otherwise is against reason, expediency and public policy. Its prime object, so far as it confers exclusive jurisdiction on Justices of the Peace, was to reduce criminal expenses, and to say that it should operate as a repeal of these sections, so as to preclude the County and Corporation Courts from sentencing as for a misdemeanor on a trial of a charge of felony where the conviction is for a misdemeanor, would be to augment criminal expenses instead of reducing them, and to defeat the very intent of the Act. The Act of March 5, 1896, in terms repeals section 4106 of the Code, as amended by an Act of the General Assembly of Virginia, approved February 23, 1894.

These are the statutes conferring concurrent jurisdiction on Justices of the Peace with the County and Corporation Courts, the latter of the Acts giving the accused the right of election, being passed to meet the requirements of the *Mary Miller* decision of the Court of Appeals. The Act does not profess to repeal any other statute than these Acts, and does not expressly repeal any other. Nor can it by fair intentment be held to repeal other than the statutes it expressly repeals. Repeals by implication are not favored, and especially is this so as to the jurisdiction of courts, it being presumed that the legislature does not intend to oust courts of jurisdiction, and any construction leading to such a result is to be avoided if possible. "Repeals by implication are not favored, and will not be decreed unless it is manifest that the legislature so intended. As laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is not only irreconcilable, but also clear and convincing and following necessarily from the language used unless the latter Act fully embraces the subject-matter of the earlier, or unless the reason for the earlier Act is beyond peradventure removed. Hence every effort must be used to make all

Acts stand, and, if by any reasonable construction they can be reconciled, the latter Act will not operate as a repeal of the earlier. It is frequently found that the conflict between two statutes is apparent, only as their objects are different, and when the language of each is restricted to its own object they run in parallel lines without meeting.” 23 Am. & Eng. Encyc. Law, 489 *et seq.* In support of the text numerous decisions are cited, among them *Davies v. Creighton*, 33 Gratt. (which see at p. 698); that it embodies familiar rules for the construction of statutes every well informed lawyer will admit. Tested by these fundamental canons of construction, is it not the duty of the courts to hold that the statutes authorizing a sentence for such part of an offence, for which a party is convicted, whether the same be felony or misdemeanor, where there is an indictment for felony, if substantially charged in the indictment, and authorizing a sentence for petit larceny on a charge of grand larceny, being sections 4040 and 4043 of Code, are not repealed by the Act of March 5, 1896? They are entirely reconcilable, the one with the other, and should be held to consist with each other. The County and Corporation Courts acquire jurisdiction because the charge is felony, the indictment is of a felony, and the fact that the proof shows a misdemeanor does not oust the court of its already acquired jurisdiction, but, having taken jurisdiction, it proceeds to judgment under the statutes. The legislature knew of these statutes, and it is to be presumed that it intended that they should stand, for it failed to expressly repeal them, and the rules of legal construction the legislature is also presumed to have been familiar with, and consequently knew that repeals by implication were not favored, and that the courts would, if they could, hold that these statutes should stand and consist with the Act of March 5, 1896. Hence I say this was the legislative intent, and, when it is discovered, nothing is left for the courts but to carry out that intent. There is no stronger rule of construction than that which is known as the *argumentum ab inconvenienti*, or against absurdity, it being unreasonable to suppose that the legislature intended their own stultification. Apply this rule, or rather these two rules, of construction to the interpretation of the Act, and its meaning is made clear.

The legislature of Virginia, in the spring of 1896, seeing that a reduction of expenses was necessary in order that the State might be enabled to meet its accruing obligations, set to work, in the interest of economy, to curtail criminal expenses, which were the greatest drain on the resources of the Commonwealth, and passed the Act of March

5, 1896. Now, to hold that this Act repeals by implication sections 4040 and 4043 of the Code would, I submit, bring about this result in many instances, that when the Corporation or County Courts try a case of felony, if, after the examination of witnesses, at the trial, it turns out that no felony but a misdemeanor has been committed, although the court is present ready to enter judgment, the jury summoned, sworn and empanelled and anxious to render a verdict, the Commonwealth's Attorney present, the trial is brought to a sudden stop, for the court and jury are alike powerless to convict of the only offence proven to have been committed, to-wit: a misdemeanor, and, in addition to the expenses already incurred, the prisoner must be sent before a Justice of the Peace for another trial, for one has already taken place, but the prisoner has never been in jeopardy, for the court that tried him was without jurisdiction. Witnesses must be again recognized or summoned; then in all probability an appeal is taken from the Justice's decision, and another trial takes place before the court that had already had cognizance of the case, which entails increased expenses, delays and more trouble, in fact more everything but the expeditious enforcement of the penal laws of the State—which presents a spectacle of “confusion worse confounded.” Such a construction would inevitably bring about a state of things contrary to the plain intent of the legislature, and in the light of the cases above cited, and in view of the elementary rules for the construction of statutes, it must be clear that the Act of March 5, 1896, does not take away the right of the County and Corporation Courts on a trial of felony, where there is a conviction under the statute for a misdemeanor, to sentence as for a misdemeanor.

JOHN H. INGRAM.

Manchester, Va.

BY THE EDITOR.—Since the foregoing was in type a decision has been rendered by the Court of Appeals, denying a writ of error in *Reynolds v. Commonwealth*, which is in accord with the views expressed by Judge Ingram in his article.